Supreme Court, U.S.
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No. 06-850

IN THE

Supreme Court of the United States

CINERGY CORPORATION, PSI ENERGY, INC., CINCINNATI GAS & ELECTRIC CO., AND CINERGY SERVICES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA

AND

STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW JERSEY, HOOSIER ENVIRONMENTAL COUNCIL, AND OHIO ENVIRONMENTAL COUNCIL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case is a clear "hold" for *Duke Energy*, which was argued on November 1, 2006, and which this Court will decide this Term. Indeed, the Government acknowledges that "[t]he questions presented in this case are already before this Court in *Environmental Defense* v. *Duke Energy Co*[*rp*].," and that a "hold" is at least appropriate. U.S. Br. in Opp'n at 8. The Respondent States concede without qualification that "the Court should hold Cinergy's petition in abeyance until *Duke Energy* is decided." States Br. in Opp'n at 1.

Faced with an obvious "hold-for" petition, Respondents nonetheless make two arguments. First, the Government argues that the Court should deny the petition notwithstanding the pendency of *Duke Energy*, because this is an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Second, the Government and the Respondent States then devote substantial briefing to the merits—in an apparent attempt to show that Cinergy's case is an inadequate vehicle for the issues deemed to be worthy of review by this Court in *Duke Energy*. Respondents are incorrect on both counts.

I. THE PROPER DISPOSITION OF THIS PETITION IS TO HOLD FOR *DUKE ENERGY*.

The Government argues that the Petition should be denied, rather than held, because the appeal is "interlocutory." U.S. Br. in Opp'n at 8-9. The Government provides no other reason to deviate from the Court's regular practice of holding petitions pending the resolution of cases involving the same issues—and none exists. To the contrary, there is an important reason to follow the ordinary practice in this case. If the Court does not reach the questions presented in *Duke Energy*, this petition provides a vehicle to do so.

In such an event, the interlocutory posture of the decision below would be "no impediment to certiorari," because the court of appeals "has decided an important issue, otherwise

worthy of review" and final resolution of that issue will "serve to hasten or finally resolve the litigation." Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002). These factors plainly are present here, because (1) the decision below squarely conflicts with the decision of another court of appeals regarding issues that this Court already has deemed sufficiently important to warrant certiorari; and (2) the courts below have concluded that the issues "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). As the district court observed in certifying these issues for interlocutory appeal, the questions presented are "central to this litigation," and "control[] how the parties must calculate emissions increases to determine the facts of this case for trial"—which, if it occurs, is certain to be lengthy and complex. Pet. App. 24a. Thus, the Court's ultimate disposition of the issues presented will significantly "expedite the resolution of this case." *Id.*

The Court frequently grants certiorari in discretionary § 1292(b) appeals such as this. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 (2005) (reviewing decision reversing and remanding denial of Rule 12(b)(6) motion to dismiss complaint); *Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14, 22 (2004) (reviewing decision reversing and remanding grant of motion for partial summary judgment); *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 374 (2004) (reviewing decision reversing and remanding denial of motion for summary judgment); *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 5-6 (2003) (reviewing decision reversing and remanding denial of motion to remand removed case); *Bartnicki* v. *Vopper*, 532 U.S. 514, 521-22 (2001) (reviewing decision reversing and remanding denial of motion for summary judgment); *Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 243-44 (2000) (reviewing decision reversing and remanding denial of motion for summary judgment). In short,

the posture of this case counsels *in favor of* holding, and if necessary granting, the petition.

II. THIS PETITION SQUARELY PRESENTS THE QUESTIONS AT ISSUE IN *DUKE ENERGY*.

In an apparent effort to show that this case is an inadequate vehicle through which to address the questions presented, Respondents devote considerable attention to the merits. These issues already have been fully briefed in *Duke Energy*, and further briefing in that case is unnecessary and inappropriate. As for this petition, Cinergy has three principal responses.

First, Cinergy is not relying on a "superseded" regulation, as the States contend. See States Br. in Opp'n at 3-5. The States rely upon a stray parenthetical in a footnote in the D.C. Circuit's lengthy *Alabama Power* decision. See *id.* at 4 (citing *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 348 n.24 (D.C. Cir. 1979)). Tellingly, the Solicitor General does not make this argument. Indeed, confirming the error in this position requires only a quick look at the Code of Federal Regulations. Section 52.01(d) has appeared in every edition of the C.F.R. since 1974, and still appears there today.

Of course, EPA "amended" § 52.01 in 1978, "delet[ing] and reserv[ing]" § 52.01(f). 43 Fed. Reg. 26,388, 26,410 (June 19, 1978). But EPA left § 52.01(d) untouched. *Id.* EPA's revision of part of this regulation while leaving the remainder intact provides no basis for asserting that § 52.01(d) has been "superseded." To the contrary, it demonstrates that § 52.01(d) remains in full force.

Second, the contention that the Ohio and Indiana State Implementation Plans, or "SIPs," do not contain the definition of "modification" set forth in § 52.01 is simply incorrect. See U.S. Br. in Opp'n at 12-13; States Br. in Opp'n at 5. Respondents cite the regulations incorporating the "Federal [PSD] Implementation Plan," or "FIP," into the Ohio and Indiana SIPs, which appear in "part 52" of the C.F.R. See 40 C.F.R. § 52.793 (Indiana); *id.* § 52.1884 (Ohio). And the "General

Provisions" of part 52, which include § 52.01, apply to "*[a]ll terms* used in th[at] part." *Id.* § 52.01 (emphasis added).

Third, Respondents' contention that Cinergy long "knew" of EPA's 1999 enforcement interpretation relies upon a gross mischaracterization of Cinergy's arguments. Respondents make the facile observation that the New Source Review regulations use "actual emissions," in "tons-per-year"—a point that Cinergy has never disputed. U.S. Br. in Opp'n at 9; States Br. in Opp'n at 6-9; see Pet. Cert. 11-12. They also rely on contemporaneous documents addressing EPA's so-called "WEPCo Determination," which the Seventh Circuit ultimately rejected as unlawful. See U.S. Br. in Opp'n at 9-12; States' Br. in Opp'n at 6-9; see also *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 917-18 (7th Cir. 1990). The merits of these arguments have been fully briefed, and the Court likely will address them in *Duke Energy*. If it does not, they should be addressed on writ of certiorari in this case. They provide no reason to deny the petition at the outset.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for certiorari, the petition should be held for and disposed of in light of the Court's decision in *Duke Energy*.

Respectfully submitted,

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